Bank Utama (M) Bhd v Insan Budi Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–931 OF 2002
MOKHTAR SIDIN, SURIYADI AND,HASAN LAH JJCA
8 AUGUST 2008

B

Banking — Banker and customer — Duty of banker — Whether failure to send credit facility using correct procedure was causa causans of termination of contract — Whether defendant as professional adviser may be held concurrently liable in both contract and in tort

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The plaintiff company embarked upon an international trade facility for the import of raw sugar and its onward sale to a local buyer. It approached the defendant bank for credit facilities to engage in the said international trade facility. On 13 June 1994, the defendant issued a letter of offer comprising a letter of credit, trust receipts and exchange forward line based on a debenture over the plaintiff company's fixed and floating assets and a joint and several guarantee of the directors of the plaintiff company as security. On 27 July 1994, the defendant concluded a foreign exchange deal for the first shipment of the raw sugar at RM6,415,200. Thereafter the plaintiff signed a contract with Arrow Agencies for the supply of raw grade E sugar and accordingly informed the defendant of the assignment of the letter of credit to Arrow Agencies. On 4 January 1995, Arrow Agencies wrote to both the plaintiff and the defendant bank to state that they had arranged for the supply of 100,000 metric tons of grade E raw sugar and that the amended letter of credit would be established with a conditional Swift Telegraphic Transfer (STT). On 30 January 1995 the plaintiff wrote to the defendant to instruct them to issue a confirmed irrevocable, divisible, assignable and transferable cash blocked STT in favour of Arrow Agencies banker, Nedbank Division. On 6 February 1995, the defendant informed Arrow Agencies that it was in the process of sending the STT for the first shipment of 12,500 metric tons of raw sugar but on 7 February 1995 it sent the STT by a wrong procedure. Although the plaintiff had complied with all the terms agreed by both parties on 16 February 1995, the defendant breached the contract prematurely on 1 March 1995 by cancelling the banking facilities. As a result of the termination of the contract by the defendant, Arrow Agencies terminated its contract with the plaintiff on 31 March 1995. It was the plaintiff's contention that as a result of the defendant's failure to send the STT in the proper manner, Arrow Agencies had terminated its contract to supply raw sugar to the plaintiff. The plaintiff therefore instituted its claim against the

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defendant bank for loss and damages arising from the breach of contract which resulted in the supply of raw sugar from the overseas supplier being aborted and the cancellation of the sale of the raw sugar to the local buyer. The plaintiff also proceeded against the defendant for negligence in its failure to fulfill its duty of care to the plaintiff as its customer. The defendant counterclaimed against the plaintiff for a total sum of RM651,878.80 in respect of the processing fee, commission, telex charges, legal costs and loss in the forex contract. The trial judge held that the plaintiff was entitled to base its claim both in contract and in tort because the defendant had breached its contract with the plaintiff and had also acted negligently in sending the STT. In this appeal against that decision, the defendant contended that the trial judge had erred in his finding that the failure to send the STT using the correct procedure was the causa causans of Arrow Agencies' termination of the contract because there was no credible or acceptable evidence that the STT was not properly sent. The defendant further contended that the trial judge had erred in law when he enlarged the scope of the bank's duty by imposing upon the defendant an advisory obligation which was never undertaken by the defendant.

Held, dismissing the appeal by the defendant with costs and allowing the cross-appeal by the plaintiff with costs:

(1) The evidence was clear that Nedbank could not process the STT in respect of the first shipment because it was sent by a wrong procedure. As such the STT was the causa causans of Arrow Agencies' termination of the contract to deliver the first shipment of sugar and there was no merit to the defendant's submission to the contrary. Further the fact that the defendant did not question or dispute Arrow Agencies' letter of termination showed that it was deemed to have accepted the contents of that letter. Thus the trial judge was right in his finding that the contract between the plaintiff and Arrow Agencies was terminated (see paras 54–55).

(2) Having carefully considered the authorities cited and the decision of the trial judge, it was clear that the trial judge had not erred in his finding that the defendant, as a professional adviser, may be held liable concurrently both in contract and negligence or tort (see paras 57–58 & 63.)

(3) In the instant case the trial judge had made a finding of fact that, in the circumstances of the case, the defendant had a duty to advise the plaintiff as its customer that STT messages were not sent by facsimile. As there was no flaw in the trial judge's finding on this question of fact, the defendant's complaint on this point was devoid of merit (see para 68).

(4) Upon a careful consideration of the evidence, both oral and documentary, and the finding of the trial judge it was clear that a contract was formed on 16 February 1995 relating to the credit facilities for the total amount of USD20.65m and thus there was no merit in the defendant's submission to the contrary (see para 78).

(5) When the defendant breached its contractual duty of care in sending the STT and breached the contract of 16 February 1995, Arrow Agencies terminated its contract with the plaintiff. It follows therefore that the defendant was not entitled to get the amount claimed in its counterclaim (see para 79).

(6) After a careful consideration of the deductions made by the trial judge in respect of processing fees, legal/professional fee and the rounding up of the figure to RM500,000 it was clear that there was an excess deduction made by the trial judge. Therefore the damages to be awarded to the plaintiff should be adjusted to RM618,492 (see para 89).

(7) Further, based on the available evidence, the trial judge had not erred in principle in assessing the loss of profit for only 12,500 metric tons instead of for 100,000 metric tons of sugar (see para 95).

[Bahasa Malaysia summary

Syarikat plaintif memulakan kemudahan perdagangan antarabangsa untuk mengimport gula mentah dan penjualannya kepada pembeli tempatan. Ia berjumpa dengan bank defendan untuk kemudahan pinjaman untuk melibatkan diri dalam kemudahan perdagangan antarabangsa tersebut. Pada 13 Jun 1994, defendan mengeluarkan satu surat tawaran yang mengandungi surat kredit, resit amanah, dan 'exchange forward line' berasaskan debentur atas aset-aset tetap dan terapung syarikat plaintif dan jaminan bersama dan berasingan pengarah-pengarah syarikat plaintif sebagai sekuriti. Pada 27 Julai 1994, defendan mencapai satu perjanjian pertukaran asing untuk penghantaran pertama gula mentah untuk jumlah sebanyak RM6,415,200. Kemudian plaintif menandatangani satu perjanjian dengan Arrow Agencies untuk membekalkan gula mentah gred E dan dengan itu memberitahu defendan mengenai peletakan hak surat kredit kepada Arrow Agencies. Pada 4 January 1995, Arrow Agencies menghantar surat kepada plaintif dan bank defendan untuk menyatakan bahawa mereka telah mengurus untuk pembekalan 100,000 tan metrik gula mentah gred E dan bahawa surat kredit yang dipinda akan dibuat dengan 'Swift Telegraphic Transfer' ('STT') bersyarat. Pada 30 Januari 1995 plaintif menulis kepada defendan mengarahkan mereka untuk mengeluarkan STT yang disekat tunai, yang disahkan tidak boleh dibatalkan, dibahagi, diletak hak dan dipindah milik bagi pihak bank Arrow Agencies, Nedbank Division. Pada 6 Februari 1995,

A defendan memberitahu Arrow Agencies bahawa ia berada dalam proses menghantar STT untuk penghantaran pertama 12,500 tan metrik gula mentah tetapi pada 7 Februari 1995 ia menghantar STT melalui prosedur yang salah. Walaupun plaintif telah mematuhi kesemua terma-terma yang dipersetujui oleh kedua-dua pihak pada 16 Februari 1995, defendan B memungkiri kontrak secara pra masa pada 1 Mac 1995 dengan membatalkan kemudahan perbankan. Disebabkan oleh penamatan kontrak oleh defendan, Arrow Agencies menamatkan kontraknya dengan plaintif pada 31 Mac 1995. Ia adalah hujahan plaintif bahawa disebabkan oleh kegagalan defendan menghantar STT melalui cara yang betul, Arrow Agencies telah menamatkan C kontraknya untuk membekalkan gula mentah kepada plaintif. Plaintif oleh itu memulakan tuntutannya terhadap defendan untuk kerugian akibat daripada kemungkiran kontrak yang menyebabkan pembekalan gula mentah dari pembekal luar negara dibatalkan dan pembatalan penjualan gula mentah kepada pembeli tempatan. Plaintif juga meneruskan terhadap defendan D untuk kecuaian atas kegagalannya untuk menjalankan kewajipan berhati-hati terhadap plaintif sebagai pelanggannya. Defendan menuntut balas terhadap plaintif untuk jumlah sebanyak RM651,878.80 untuk fi memproses, komisen, bayaran teleks, kos perundangan dan kerugian dalam kontrak forex. Hakim bicara memutuskan bahawa plaintif berhak untuk mendasarkan E tuntutannya atas kontrak dan juga tort kerana defendan telah memungkiri kontraknya dengan plaintif dan juga telah bertindak secara cuai dalam menghantar STT. Di dalam rayuan ini terhadap keputusan tersebut, defendan menghujah bahawa hakim bicara telah terkhilaf dalam penemuannya bahawa kegagalan menghantar STT menggunakan prosedur F yang betul adalah 'causa causans' Arrow Agencies menamatkan kontrak kerana tidak ada keterangan yang boleh dipercayai atau yang boleh diterima bahawa STT tidak dihantar dengan betul. Defendan selanjutnya menghujah bahawa hakim bicara telah terkhilaf dari segi undang-undang apabila beliau meluaskan skop kewajipan bank dengan meletakkan pada defendan obligasi G penasihat yang tidak pernah diakui oleh defendan.

Diputuskan, menolak rayuan defendan dengan kos dan membenarkan H rayuan balas plaintif dengan kos:

(1) Keterangan adalah jelas bahawa Nedbank tidak boleh memproses STT berkaitan dengan penghantaran pertama kerana ia dihantar melalui prosedur yang salah. Oleh itu STT adalah 'causa causans' Arrow Agencies menamatkan kontrak untuk menghantar penghantaran I pertama gula dan tidak terdapat merit dalam penghujahan defendan sebaliknya. Selanjutnya, fakta bahawa defendan tidak menyoal atau mempertikaikan surat penamatan Arrow Agencies menunjukkan bahawa ia dianggap sebagai telah menerima kandungan surat berkenaan. Oleh yang demikian hakim bicara adalah betul dalam

penemuannya bahawa kontrak di antara plaintif dan Arrow Agencies telah ditamatkan (lihat perenggan 54–55). A

(2) Setelah mempertimbangkan dengan teliti autoriti-autoriti dan keputusan hakim bicara, adalah jelas bahawa hakim bicara tidak terkhilaf di dalam penemuannya bahawa defendan, sebagai penasihat profesional, boleh dijadikan bertanggungjawab secara serentak dalam kontrak dan kecuaian atau tort (lihat perenggan 57–58 & 63). B

(3) Di dalam kes ini hakim bicara telah membuat penemuan fakta bahawa, di dalam keadaan kes ini, defendan mempunyai kewajipan untuk menasihati plaintif sebagai pelanggannya bahawa mesej STT tidak dihantar melalui faksimile. Oleh sebab tidak terdapat kecacatan dalam penemuan hakim bicara atas persoalan fakta, aduan defendan atas poin ini adalah tidak bermerit (lihat perenggan 68). C

(4) Atas pertimbangan yang teliti terhadap keterangan, lisan dan dokumentar, dan penemuan oleh hakim bicara, adalah jelas bahawa suatu kontrak telah dibentuk pada 16 Februari 1995 berkaitan dengan kemudahan kredit untuk jumlah sebanyak USD20.65j dan oleh itu tidak ada merit dalam penghujahan defendan sebaliknya. (lihat perenggan 78). D

(5) Apabila defendan melanggar kewajipan berjaga-jaga kontraknya dalam menghantar STT dan memungkiri kontrak bertarikh 16 Februari 1995, Arrow Agencies membatalkan kontraknya dengan plaintif. Oleh itu defendan tidak berhak untuk mendapat jumlah yang dituntut di dalam tuntutan balasnya (lihat perenggan 79). E F

(6) Selepas pertimbangan yang teliti terhadap penolakan yang dibuat oleh hakim bicara berkenaan dengan fi pemprosesan, fi perundangan/profesional dan pembulatan jumlah kepada RM500,000 ia jelas bahawa terdapat penolakan yang berlebihan yang dibuat oleh hakim bicara. Oleh itu ganti rugi yang diawardkan kepada plaintif perlu diselaraskan kepada RM618,492 (lihat perenggan 89). G

(7) Selanjutnya, berdasarkan kepada keterangan yang didapati, hakim bicara tidak terkhilaf dalam prinsip dalam menilai kerugian keuntungan untuk hanya sebanyak 12,500 tan metrik dan bukannya untuk 100,000 tan metrik gula (lihat perenggan 95).] H

Notes

For cases on duty of banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1818–1824. I

Cases referred to

Amar Singh v Chin Kiew [1960] MLJ 77, CA (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411, CA (refd)
Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors [2004] 1 MLJ 657, CA (refd)
Guan Ming Hardware & Engineering Pte Ltd v Chong Yeo & Partners & Anor [1966] 2 SLR 621, HC (refd)
Hadley v Baxendale 1854 9 Exch 341; (1854) 156 ER 145, CA (refd)
Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344, CA (refd)
Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801, HL (distd)
New Kok Ann Realty Sdn Bhd v Development & Council Bank, New Hebrides (in liquidation) [1987] 2 MLJ 57, SC (distd)
Rowlands v Collow [1992] 1 NZLR 178, HC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Ltd & Ors [1986] 1 AC 80, PC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 74
Courts of Judicature Act 1964 s 42
Income Tax Act 1967 Schedule 1 para 2

Shahul Hameed Amirudin (Mohd Faizal Abd Aziz with him) (Zul Rafique & Partners) for the appellant.
Ramdas Tikamdas (Ernest JK Azad with him) (Ernest Azad & Associates) for the respondent.

Hasan Lah JCA (delivering judgment of the court):

INTRODUCTION

[1] This is the appellant's appeal against the whole of the decision of the High Court. The respondent has also appealed against the decision but limited to the issue of quantum of damages awarded in its favour. The respondent in this appeal was the plaintiff in the court below and the appellant was the defendant. The crux of the plaintiff's claim against the defendant was for breach of contract and negligence by the defendant as banker to fulfil their contractual obligation and duty of care to the plaintiff as their customer in respect of an international trade facility for the import of raw sugar and onward sale to a local buyer. This breach by the defendant resulted in the supply of raw sugar from the overseas supplier being aborted, and cancellation of the sale to the local buyer, hence the loss and damages claimed by the plaintiff against the defendant.

[2] The defendant counterclaimed against the plaintiff for a total sum of RM651,878.80 in respect of processing fee, commission, telex charges, legal costs and loss in the forex contract.

FACTS

[3] The essential facts are this. PW1 (Mohd Said bin Ab Latif) formed the plaintiff company in 1993 to trade in plastic packing. The company was his family company with his two cousins as directors. On 26 April 1994 Gula Padang Terap issued a letter of offer to the plaintiff to supply raw sugar to Gula Padang Terap. That letter reads as follows:

> Re: Purchase of Raw Sugar From Meridian
>
> International Inv. Inc. Oregon, USA
>
> Further to our discussion on 24 April '94, we are pleased to propose our terms and conditions on the said purchase as follows:

(1)	Product specification		
	Pol	:	97.88%
	ICUMSA	:	3520 mau (44.01 stammer, approx)
	Filterability	:	15.42%
	Moisture	:	0.51%
	Ash Content	:	0.32%
(2)	Quantity	:	100 mt. Subject to paragraph (B) below
(3)	Period of delivery	:	From June 94 to July 95
(4)	Packing	:	In Bulk
(5)	Payment	:	By letter of credit for each shipment and payable after presentation of all proper documents

(B) As agreed, the 100,000 mt raw sugar is to be handled in the following manner:-

> To ship the first 15,000 mt in June '94 and this is to be considered as a 'test' cargo.
>
> In the event that the first shipment is proven to be a success whereby it complies to all our terms, then GPT shall enter into the agreement to take delivery of the balance quantity of 85,000 mt i.e. 100,000 mt less 15,000 mt.

(C) For the purpose of B(2) above, we would appreciate if you can arrange to give a draft copy of the agreement as soon as possible.

[4] PW1 then approached the defendant bank for credit facilities, followed by an 'application for standby letter of credit' dated 3 May 1994. On 12 May 1994 the defendant issued an offer of banking facilities for the import of 100,000 metric tons of raw sugar by the plaintiff. The offer was accepted by the plaintiff.

[5] On 20 May 1994 the plaintiff entered into a contract with Meridian International Investment Incorporation ('Meridian') whereby Meridian agreed to sell and the plaintiff agreed to purchase 100,000 metric tons of Grade 'E' Raw Cane Sugar at a price of USD198 per metric ton, totalling USD19m. Regarding payment and documents, the contract provides:

> Payment: 'Full Standby letter of credit,' irrevocable, transferable, assignable, divisible, unrestricted, unencumbered, and issued by a Prime World Bank acceptable to Seller, having a maturity date of twelve months and one day (herein referred to as 'Financial Instrument').

[6] On 13 June 1994, the defendant issued a fresh letter of offer comprising a letter of credit, trust receipts and exchange forward line. This second facility is for the sum of RM53m. The security under this facility comprised of, inter alia, a debenture over the company's fixed and floating assets and a joint and several guarantee of the directors of the plaintiff company. All fees and expenses in connection or incidental to the facility was to be borne by the plaintiff.

[7] On 24 June 1994, the plaintiff instructed the defendant to issue the letter of credit for the benefit of Meridian. On 25 June 1994, the defendant issued the letter of credit in favour of International Trust Management Corporation for the benefit of Meridian for USD19,800,800. At the plaintiff's request, an amended letter of credit was issued on 28 June 1994.

[8] On 27 July 1994, the defendant concluded a foreign exchange deal for the first shipment of the raw sugar at RM6,415,200. It appears that from 19 August 1994, Meridian was still trying to solve the problem it had with the suppliers.

[9] On 30 September 1994 the defendant informed the plaintiff that it has decided to cancel the forex contract. The defendant's letter said:

> CANCELLATION OF FOREX CONTRACT NO. 41612
>
> USD2,475,000 MATURING SEPTEMBER 26,1994
>
> We write to inform you that we have cancelled the above contract at the exchange rate of 2.5580 as per our telephone conversation on September 28, 1994 due to the uncertainty in delivery of the goods as mentioned.

There is an exchange loss incurred in the cancellation of the foreign exchange contract. The sum is RM84,150.

We would appreciate your immediate action to reimburse us for the exchange loss incurred.

[10] On 7 November 1994 the defendant, by a letter, informed the plaintiff that it had decided to cancel the letter of credit with immediate effect. The letter is as follows:

Sub: INSAN BUDI SDN. BHD. – LETTER OF CREDIT FOR RM53,000,000.00 ISSUED IN FAVOUR OF MERIDIAN INTERNATIONAL INC.

The above subject and our letter dated October 19, 1994 refers.

Thank you for the copy of the Letter from Gula Padang Terap dated October 29, 1994. However our management still consider Gula Padang Terap is rather non-committed and they have not confirmed on the new price. It is very important to formalise since the payment for this Letter of Credit is coming from them.

The delay in the shipment and all the problem encountered since issuing the Letter of Credit, indicate lack of experience of the parties involved in handling this transaction. To avoid any further risk, our management proposed for the documents to be on collection basis subject to the acceptance by Gula Padang Terap.

In view of the above situation our management with pursuant to Article 41 of UCP 500, decided to recall and cancel the Letter of Credit with immediate effect. And request Insan Budi Sdn. Bhd to pay all charges and commission immediately. Any requirement for the Letter of Credit a fresh application has to be submitted.

Shall (sic) you disagree with our management's decision to withdraw the Letter of Credit please let us have your reasons technically as well as legally immediately.

[11] On 15 December 1994 the plaintiff, by letter, informed the defendant of the increased price of sugar and of the assignment of the defendant's letter of credit from Meridian to Arrow Agencies. Further, the plaintiff requested that the defendant covers 'the deficit upon arrival of goods against documents'. The new purchase price from Arrow Agencies is now USD242 per metric ton for the first 2,500 metric tons and USD236 per metric ton for the balance. Gula Padang Terap's purchase price was increased from USD236 per metric to USD266 per metric ton. The plaintiff and Arrow Agencies then signed a contract, which is undated.

[12] On 21 December 1994 the defendant wrote to Nedbank International Division in South Africa as follows:

Re: INSAN BUDI SDN BHD CREDIT FACILITIES WITH BANK UTAMA (M) BHD

We, Bank Utama (M) Berhad are pleased to advise that Insan Budi Sdn Bhd customer of our Bank. Insan Budi Sdn Bhd is currently enjoying a total credit facilities of RM53,000,000.00.

We have found Insan Budi Sdn Bhd to be credit worthy and are pleased to support them in their business. Further we have received an undertaking from the said Buyer that they shall reimburse us on the differential sum provided all the documents is in compliance with all the terms and conditions incorporated between the parties in the Sale/Contract Agreement.

[13] Again, on the same day (21 December 1994), the defendant wrote to Arrow Agencies:

RE: CONTRACT FOR SUPPLY OF RAW GRADE 'E' SUGAR FROM ARROW AGENCIES SOUTH AFRICA FOR 100,000 TON

We refer to the above and to your letter dated 20 December 1994 wherein you have required that a fresh L.C. be issued in your favour and write to inform your goodselves that we shall consider your request provided the test shipment which is due to arrive sometimes in the near future is in compliance with the Sale Contract and further if there need to be further negotiated terms if necessary. Our client had also informed us that the subsequent shipment shall be at the price of USD236 (Two Hundred and Thirty Six Dollars) per metric tonnage.

[14] On 23 December 1994, the plaintiff wrote to the defendant instructing the defendant to amend the first letter of credit for USD19.8m as required by Arrow Agencies through its letter dated 20 December 1994.

[15] On 29 December 1994 Gula Padang Terap wrote to the defendant:

'SUPPLY OF RAW SUGAR GRAD 'E' FOR 100,000 METRIC TON AT USD266.50 PER TON FROM INSAN BUDI SDN BHD

We refer to the above and at your request, we wish to confirm the following:

That we agreed to accept the first shipment from Insan Budi Sdn Bhd or its principal supplier 12,500 mt at US266.50 per mt in 50 kg polylined jute bags and as per specifications stated in our letter dated 15.12.94.

That upon nomination of vessel we will instruct our banker to issue Letter of Credit in your client favour.

[16] On 4 January 1995 Arrow Agencies wrote to both the defendant and the plaintiff. The letter reads:

I HAVE ARRANGED YOUR SUPPLY OF 100,000 M/TONS OF GRADE E SUGAR. THE REFINARY/SUPPLIER REQUIRES A LETTER FROM YOUR BANK STATING TO THE EFFECT THAT ONCE THE BILL OF LADING

IS PRESENTED ON THE FIRST SHIPMENT, THE AMENDED LETTER OF CREDIT WOULD BE ESTABLISHED WITH THE CONDITIONAL SWIFT T/T. THIS IS THE ARRANGEMENTS WE HAD MADE,

THE SUPPLIER IS FROM A NEW MANDATE AND IS VERY RELUCTANT TO ISSUE A CONTRACT WITHOUT A L/C. I AM COAXING THEM THROUGH MY MANDATE TO ACCEPT YOUR PROCEDURES. PLEASE RELAY YOUR BANK LETTER TO ALLY ANY FEARS ON THEIR PART THAT AN L/C WOULD BE ISSUED.

KINDLY TREAT AS TOP PRIORTY.

[17] On the following day (5 January 1995), the defendant wrote to Arrow Agencies, inter alia:

However on our part we would like to indicate to you that we have received an undertaking letter from Insan Budi Sdn Bhd and their client to accept and make payment for the goods upon arrival of documents with us. Provided that they are in compliance with the conditions as agreed upon as per contract between your Goodself and Insan Budi Sdn Bhd.

Furthermore upon shipment of goods and presentation of relevant documents to us and subject to the approval of our Head Office, we shall on behalf of Insan Budi Sdn Bhd issue a fresh Letter of Credit for the shipment to be delivered and will be sent by Swift T/T.

[18] On 24 January 1995, Arrow Agencies wrote to the defendant requesting a letter from the defendant to state that the funds are 'blocked' for the full transaction.

[19] The defendant responded on 25 January 1995 confirming that the facilities were 'solely blocked to be used for the purchase of raw sugar to fulfil their (plaintiff's) contract with their client'. This was followed by a letter from the defendant dated 27 January 1995, inter alia:

I, the undersigned hereby confirm for and on behalf of our client Insan Budi Sdn Bhd No. 23, Jalan 15/5C, Subang Jaya, Selangor Darul Ehsan Account No. 1-020-000066-8 that our client has unencumbered banking facilities available with our Bank in the amount of US$19,800,000 (United States Dollar Nineteen Million And Eight Hundred Thousand Only) previously held under Letter of Credit No. ST/AM/94-1 and has given us instruction to hold this amount for the purchase of Grade E Raw Sugar as mentioned above.

This confirmation is valid from date of issuance of this letter.

[20] On 30 January 1995 the plaintiff wrote to the defendant:

> We refer to the meeting at 1.15 pm today at your office and write to instruct your goodselves to issue on our behalf a confirmed irrecovable, divisible, assignable and transferable cash blocked Swift Wire Transfer in favour of Arrow Agencies for the amount of USD2,950,000 for one (1) ship load of grade 'E' cane sugar of 12,500 metric ton (+/-) 5%) at USD236 per metric ton ...

The letter ended with the following paragraph:

> Kindly telefax the said instrument direct to Arrow Agencies banker (Nedbank – details to be found in your file) urgently.

[21] On 6 February 1995, the defendant wrote to Arrow Agencies:

> CONFIRMATION OF CASH BACKED SWIFT
>
> We refer to the above and write to inform your goodselves that we are in the midst of processing to confirm the SWT for the sum of USD2,950,000 for the first shipment of 12,500 metric ton and the confirmation shall be send to you soonest possible.
>
> The delay in processing the same was due to the fact that there was a week long holiday in Malaysia last week.

[22] On 8 February 1995, the defendant issued another offer letter comprising, inter alia, a confirmed irrevocable, divisible, assignable and transferable cash backed SWIFT for USD2.95m for one shipload of 12,500 metric tons of Grade 'E' sugar at USD236 per metric ton. The security for the facility was a letter of credit from Gula Padang Terap. The offer was accepted by the plaintiff.

[23] The defendant then prepared a SWIFT wire transfer message to Nedbank Division as per the terms of the defendant's letter dated 8 February 1995 reproduced earlier.

[24] On 11 February 1995, the plaintiff wrote to the defendant. The letter reads:

> Re: BANKING FACILITIES TO INSAN BUDI SDN. BHD. FOR THE PURCHASE OF RAW SUGAR FROM ARROW AGENCIES C.C. DURBAN, SOUTH AFRICA, 100,000 METRIC TON
>
> We refer to the above and to your letter dated 8 February 1995 and regret to note that the swift wire transfer was only sent by fax to our client banker, and not actual swift itself.
>
> Our supplier had arranged for the first shipment of the goods on the 8 February 1995 itself, but due to the none arrival of the swift the shipment is again delayed and they have incurred 3 days demurrage charges for USD45,000 at USD15,000 per day. And they have threatened to debit our account for this delay.

As such we instruct your goodselves to issue a proper swift to their banker by 10.00 a.m. on 11 February 1995 without fail. A

Please ensure that the details our client's banker namely Nedbank International Division and its account number are properly and correctly imprint.

Kindly also change the date of the swift for the purpose of nomination of the vessel as the swift dated 8 February 1995 could not be met by our client since 72 hours deadline will expire shortly. B

[25] On the same day (11 February 1995) the defendant sent the SWIFT wire message to the seller's bank, Nedbank using free format, MT99. C

[26] On 13 February 1995 Arrow Agencies sent a fax to the plaintiff. The fax, inter alia, reads:

RECEIVED A COPY OF THE CONDITIONAL SWIFT FOR AMOUNT OF US$2.95 MILLION AT MY BANKERS, BUT THE SWIFT (WAS) NOT CODED OR KEYED FOR CLEARANCE. KINDLY ADVISE YOUR BANK (TO) OPEN CORRESPONDENCE WITH MY BANK ... D

[27] In response to the defendant SWIFT wire message sent on 11 February 1995, Nedbank informed the defendant on 15 February 1995 that: E

... We are unable to process the above mentioned SWIFT as it is an unauthenticated message. We have discharged the SWIFT from our files as null and void and no further action will be taken. F

[28] A meeting was held between the plaintiff and the defendant on 16 February 1995. Arising out of the meeting, two letters were sent out on the same day. The first is a letter by the plaintiff's solicitor to Arrow Agencies. The letter reads: G

Re: INSAN BUDI SDN BHD CREDIT FACILITIES WITH BANK UTAMA (MALAYSIA) BERHAD FOR THE PURCHASE OF GRADE E RAW SUGAR 100,000 TONS CONFIRMATION OF THE AVAILABILITY AND BLOCKAGE OF FUNDS FOR TRANSFER H

We refer to the above and to our letter dated 15 February 1995 and write to inform your goodselves that pursuant to the conference held today with Bank Utama (M) Sdn. Bhd. the Directors have agreed to your request as stated in our letter stated above. Unfortunately kindly be informed that the confirmation of blocked funds can only be directed to your bankers in Geneva by Monday morning (20 February 1995) since tomorrow is a public holiday here 'Nuzul Quran'. Upon receipt of the same kindly arrange the necessary follow up and keep us informed of the developments accordingly. I

As such we apologise on behalf of our client and ensure your goodselves that there shall be no more hitches in the future.

[29] The second is the letter from the defendant to Arrow Agencies, that reads:

STANDBY letter of credit FOR SUPPLY OF RAW GRADE 'E' SUGAR FROM ARROW AGENCIES, SOUTH AFRICA FOR 100,000 MT

With reference to the above, please be informed that we are in the midst of processing to consider for issuing the above Standby letter of credit as requested by our client, Insan Budi Sdn. Bhd.

[30] On the following day (17 February 1995) the plaintiff formally applied for the issuance of confirmation of blocked funds of USD20.65m to Union Bank of Switzerland.

[31] On 28 February 1995 the defendant forwarded to Arrow Agencies a 'confirmation of the availability of credit facilities' amounting to USD20.65m. However the letter went on to state:

The availability of this credit facilities is subject to the following:

Issuance of a performance Bank Guarantee in the form and substance to our satisfaction from a first class and reputable bank acceptable to us for not less than 108% of the standby letter of credit;

Our client complying to the terms and conditions of our offer and utilisation of the credit facilities;

Satisfactory legal advise from our solicitors.

[32] On 1 March 1995 the defendant wrote to the plaintiff to inform the plaintiff that the banking facilities as stipulated in the defendant's letters of offer to the plaintiff dated 12 May 1994 and 13 June 1994 were cancelled.

[33] A meeting was held on the same day. It appears that after the meeting, the defendant's solicitors wrote to the plaintiff forwarding 'another draft copy of a letter which our clients may be prepared to issue to your supplier/broker in South Africa for your onward transmission to them for their approval'. The letter ends by saying that upon receipt of the approval from the plaintiff's supplier/broker that they are prepared to accept the draft, the defendant would issue the said letter.

[34] The plaintiff responded to that letter on the same day. In that letter the plaintiff stated, inter alia, that:

Kindly issue the said letter urgently upon receipt this instruction, the content of which to be worded as follows:

> We the undersigned hereby confirm on behalf of our client Insan Budi Sdn. Bhd. No. 23, Jalan SS15/5C, Subang Jaya 47500 Selangor Account No. 1-020-000066-8 the tour client has unencumbered banking facilities with our bank in the amount of US$20,650,000.00 (United State Dollar Twenty Million and Six Hundred and Fifty Thousand only) and has given us instruction to hold this amount available for transfer to nominated Bank Account against the issuance of an acceptable Bank Debenture Instrument issued in favour of our client by a World Prime Bank acceptable to our satisfaction.
>
> This confirmation is valid from the date of issuance of this letter and the funds available through this facilities are of no criminal origin and we the undersigned hereby confirmed that we are authorised to issue this letter.

Date:

Name/Title ...

Name/Title ...

Please act without further delay since the Supplier could no longer tolerate this undue delay any further.

[35] On 2 March 1995 the plaintiff sent another letter to the defendant which, inter alia, stated that:

> We refer to our letter dated 1 March 1995 and write to inform you that our supplier had duly informed us that they are furious and upset with us since we had failed to issue the 'Confirmation Letter' within the time limit (28 February 1995 and extended to 1 March 1995) in accordance with the format given to you as per your confirmation letter dated 27 January 1995. However since we informed them that we also have the Standby letter of credit Facilities, they require confirmation from you to that effect without fail. As such we instruct you to write formally to them in the following manner without any further changes and delay as below:
>
> > We, Bank Utama (confirming Bank ...) upon proof of product provided by you, bank to bank for 100,000 mt. Ton of Grade E sugar will open a Standby letter of credit on London Short Form 3034 for USD ... (in numbers)... (in words), in your favor for a period of one year and one day with the beneficiary to be named by you.
> >
> > I am enclosing a copy of Form 3034.

[36] On the same day (2 March 1995) the defendant's solicitors wrote to the plaintiff, in response to the plaintiff's letter to the defendant the previous day:

> We are instructed by our clients to inform you that our clients are not able to issue any letter of information/confirmation as requested by you in your above letter unless the qualifications as set out in our draft letter to you of 1 March 1995 which was faxed to you at 7.22 p.m. yesterday is acceptable to Arrow Agencies C.C.
>
> The reason is that although the above facilities have been approved by the Bank in principle, the relevant security documents required to be executed and completed for the above facilities have yet to be completed. In the circumstances, until and unless all conditions precedent as laid down by the Bank have been complied with, the Bank is not able to state categorically that you have 'unencumbered banking facilities' with the Bank or that the funds are available in any manner until you have fulfilled the requirements of the Bank as the issuance of a debenture instrument is not the only condition to be fulfilled by your Company.
>
> In fact as at the time of writing this letter, a letter of offer from the Bank setting out the conditions for the above facilities have yet to be accepted by you.
>
> In view of the above and although our clients would at all times like to be of assistance to their customers wherever possible, the Bank would not be able to accede to your request for the issuance of the letter of confirmation in the format required by you as the Bank also have steps and procedures to follow and cannot unequivocally state that 'the facilities is in existence or not fullstop' when conditions precedent have yet to be complied with by the Borrower. One of such conditions would be to seek legal advice before proceeding with any matters and not that our Solicitors have the right to veto the Board's approval.
>
> In the circumstances we are now instructed by clients to inform you that if you still wish for the Bank's assistance in issuing the letter to Arrow Agencies C.C., our clients will only issue same in the format as set out in our draft to you of 1 March 1995.
>
> The issuance of the letter will also only be made upon receipt of Arrow Agencies C.C.'s confirmation that they are prepared to accept our clients' draft and upon receipt of our clients' Head Office's approval to the contents of the said document.
>
> It would also be subject to the condition that Arrow Agencies C.C. immediately return to our clients the two (2) letters which have been issued by our clients to Arrow Agencies C.C and dated 27 January 1995 and 28 February 1995 respectively for our clients' immediate cancellation.

[37] On 6 March 1995, the plaintiff wrote to the defendant, inter alia, informing the defendant:

> The prime facilities requested for (in addition to your Swift Wire Transfer USD295 million) was a Full Standby Letter of Credit for USD20.65 million and NOT the Back to Back Letter of Credit. Our supplier insist that pursuant to our contract they had asked for the Confirmation of Availability of Blocked Funds For Transfer and since you had failed to furnish the same they had insisted for the Full Standby Letter of Credit ...

[38] On 7 March 1995, the plaintiff wrote to the defendant requesting some variations to the offer letter by the defendant dated 1 March 1995. A

[39] On 14 March 1995 the plaintiff again wrote to the defendant reminding the defendant that it had not received any response stating that the plaintiff has the full standby letter of credit facilities. B

[40] On 21 March 1995, the defendant informed the plaintiff that they were unable to issue the confirmation letter unless in the format that was forwarded by the defendant's solicitors and that the offer letter dated 1 March was accepted by the plaintiff. C

[41] On 28 March 1995, Arrow Agencies again forwarded the draft format for the confirmation letter. D

[42] On 31 March 1995, Arrow Agencies terminated the contract with the plaintiff.

[43] On 3 April 1995, the defendant wrote to the plaintiff, agreeing to some variations to the offer letter dated 1 March 1995. E

[44] On 24 April 1995 Gula Padang Terap demanded from the plaintiff their losses for the issuance of the letter of credit. F

[45] On 11 May 1995 the plaintiff issued a letter of demand to the defendant, alleging negligence on the part of the defendant.

[46] On 26 May 1995, the defendant's solicitor replied denying negligence on the part of the defendant and claiming RM651,818.40 to account for costs, expenses, charges and losses incurred by the defendant. G

FINDINGS OF THE TRIAL JUDGE

[47] In his judgment the learned trial judge made the following findings: H

(a) The plaintiff was entitled to base its claim both on contract and in tort as it did in this action;

(b) The defendant, as a bank, did owe a duty of care to the plaintiff as its customer; I

(c) The defendant was negligent regarding the sending of the SWIFT wire transfer. The defendant also had breached its contractual duty towards the plaintiff;

(d) The defendant was also in breach of the contract of 16 February 1995.

[48] With regard to damages the learned trial judge held that the plaintiff was only entitled to damages in respect of the first shipment of 12,500 metric tons. For that he awarded damages in the sum of RM500,000 to the plaintiff.

[49] With regard to the defendant's counterclaim for a sum of RM651,878.80 the learned trial judge did not make any decision on that.

THE APPEAL

[50] In his submission learned counsel for the defendant advanced several grounds of appeal. With regard to the issue of liability the first point submitted by him was that the SWIFT transmission was not the causa causans of Arrow Agencies's termination of the contract. It was his contention that the learned trial judge's finding that 'it is not disputed that as a result of the failure to send the proper SWIFT Wire Transfer, Arrow terminated the contract' was wholly erroneous and unsupported by evidence since there was no credible or acceptable evidence that the SWIFT transmission was not properly sent and more so when there was no correspondence relationship between the defendant and Nedbank and it was the plaintiff who had nominated Nedbank as the receiving bank. The learned trial judge also failed to consider sufficiently or at all the fact that the contents of the alleged letter of termination sent by Arrow Agencies to the plaintiff were not admitted by the defendant and remained unproven.

[51] According to learned counsel for the defendant as on 15 February 1995 the need for a SWIFT transmission was no longer relevant as Arrow Agencies had informed the plaintiff on 13 February 1995 that the conditional SWIFT was received but not coded or keyed for clearance and Arrow Agencies recommended that the plaintiff used confirmation of blocked funds and/or standby letter of credit as a mode of payment and on 15 February 1995 Nedbank informed the defendant that they were unable to process the SWIFT wire transfer for USD2.95m sent by the defendant on 30 January 1995 and it had discharged the same from their files as null and void and that no further action would be taken by it.

[52] It must be noted that on 6 February 1995 the defendant informed Arrow Agencies that the defendant was in the process of sending SWIFT wire transfer for the sum of USD2.95m for the first shipment of 12,500 metric tons. However on 7 February 1995 the defendant sent the said SWIFT wire transfer by a wrong procedure and as a result Arrow Agencies was unable to send the first shipment of sugar.

[53] In his judgment the learned trial judge said:

> It is not disputed that as a result of the failure to send proper SWIFT wire transfer, Arrow Agencies terminated the contract. Besides the threat by Arrow Agencies to sue the plaintiff for expenses incurred by it, the plaintiff has suffered a loss of profit which otherwise would most likely have been made had the sugar been shipped and delivered to Gula Padang Terap.

The contract referred to by the learned trial judge must be the contract to supply the first shipment of 12,500 metric tons of sugar and not the contract for the supply of 100,000 metric tons of sugar. This is because the contract for the supply of 100,000 metric tons of sugar was terminated by Arrow Agencies due to the failure of the defendant to issue the confirmation of blocked funds or the standby letter of credit as set out in Arrow Agencies's letter dated 31 March 1995 to the plaintiff. The letter is as follows:

> 31 March, 95
>
> To:
>
> INSAN BUDI SDN. BHD;
>
> 23 Jln. SS 15/5C,
>
> Subang Jaya
>
> 47500 Selangor, Malaysia.
>
> Re: Supply of 100,000 M/Tons of Grade E Raw
>
> Sugar US$23.6 million – breach of contract
>
> No. M4B0/SCHA – AXIVOE
>
> Dear Mr. Latiff,
>
> We regret to inform you that we have no choice but to terminate the contract mentioned above with immediate effect for failure on your part to establish the confirmation of blocked funds and or the standby letter of credit in our favour, despite various extensions given to you. We have also incurred demurrage charges amounting to US$450,000 and demand the said sum to be paid to us immediately failing which we shall initiate legal proceedings in Geneva to recover the said amount. Further let us have your proposal for settlement for loss of profit that we suffered as a result of breach of contract on your part within seven (7) days.
>
> Yours Sincerely,
>
> Sgd.
>
> Cassim Arbee
>
> Managing Director
>
> ARROW AGENCIES CC
>
> COMMODITY BROKERS

P.O. BOX 48569
DURBAN 4001
SOUTH AFRICA
c.c.
(a) Indus Systems
(b) Bank Utama (M) Berhad
Ampang Point Branch
Kuala Lumpur
Fax No. 03-4527462

[54] The evidence was clear that Nedbank could not process the SWIFT wire transfer for USD2.95m for payment of the first shipment because it was sent by a wrong procedure. As a result Arrow Agencies did not deliver the first shipment of sugar to Gula Padang Terap. The plaintiff therefore suffered loss because of the non-delivery of the first shipment of sugar. In our view the SWIFT transmission was the *causa causans* of Arrow Agencies's termination of the contract to deliver the first shipment of sugar. As such we hold that there is no merit on the submission made by learned counsel for the defendant on this issue.

[55] With regard to the defendant's contention that Arrow Agencies's letter of termination dated 31 March 1995 was not admitted by the defendant and remained unproven we find there is no merit in that contention. PW1 has testified that letter was sent by Arrow Agencies to the plaintiff. In that letter Arrow Agencies stated clearly that it terminated the contract with the plaintiff. The learned trial judge was therefore right in his finding that the contract was terminated. Counsel for the defendant did not ask any question or dispute this letter when he cross-examined PW1. As such he was deemed to have accepted the contents of that letter.

DUTY TO ADVISE

[56] Learned counsel for the defendant contended that the learned trial judge has erred in law when he enlarged the scope of the bank's duty by imposing upon the defendant an advisory obligation towards the plaintiff which was never undertaken by the defendant. Furthermore, this was never pleaded and no evidence was adduced to show that the defendant played an advisory role. According to learned counsel the sole duty owed by the defendant to the plaintiff as its customer is in contract. As such the pleaded case of negligence was a non-starter.

[57] In his judgment the learned trial judge has carefully considered the pleadings. The plaintiff pleaded that the defendant was professionally negligent when it negligently and carelessly sent the SWIFT wire transfer through wrong procedure. In his judgment the learned trial judge dealt with the issue of whether the defendant as a professional adviser may be held liable concurrently in both contract and in negligence or tort. The defendant argued that the plaintiff may not do so. A number of authorities was cited by learned counsel for the defendant to support that. One of the authorities relied upon by the defendant was the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Ltd & Ors* [1986] 1 AC 80. That case concerns with the duty of care of the bank in honouring forged cheques of its customer. The bank was sued for payments it made on forged cheques. The bank in its defence argued that the company, its customer, owed it a duty of care to check its own bank statements to determine if they were correctly debited. The Privy Council, in reversing the Court of Appeal of Hong Kong, held the bank to be liable to its customer because the company was not in breach of any express or implied duty to the bank. At p 107 Lord Scarman said:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the right and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximally and character of the relationship between the parties, Their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at p 587:
>
> > Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employee, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.

> Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as Their Lordships have concluded, no duty wider than that recognised in *Macmillan* [1918] AC 777 and *Greenwood* [1933] AC 51 can be implied into the banking contract in the absence of express terms to that effect, the banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

[58] The learned trial judge, after having considered and analysed the Commonwealth cases cited by counsel for the defendant and the plaintiff on this point, made the following decision:

> Considering all these authorities I am of the view that the liabilities both in tort and contract can exist concurrently or alternatively.
>
> In the present case, the plaintiff is not relying on the tortious liability to expand the liability of the defendant, but only in addition in the alternative to arrive at the same conclusion. I think the plaintiff is entitled to do it.

[59] One of the cases cited by learned counsel for the plaintiff to support his contention that the defendant was liable concurrently in contract and in negligence is the decision of the High Court of Wellington, New Zealand in *Rowlands v Collow* [1992] 1 NZLR 178. In that case the plaintiff sought to advance claims against the first defendant both in contract and tort, alleging negligence in relation to both the first defendant's design of the driveway and the adequacy of his supervision of its construction. The first defendant argued that his contractual obligation was to design the driveway, and that he had not entered into any contractual obligation to supervise the work. As a consequence, he argued he could not be liable in tort for faulty supervision. Thomas J held, inter alia, that a person performing professional services may be liable concurrently in contract and in negligence unless the terms of the contract precluded the tortious liability. At p 190 Thomas J made the following observation:

> The question of whether a professional adviser may be held liable concurrently in both contract and in negligence has been the subject of a vast amount of legal writing. Many judges have toiled with the problem and many more academics have commented upon their efforts. Two contributions stand out for their excellence. One is the decision of the Supreme Court of Canada in *Central Trust Company v Rafuse* [1986] 2 SCR 147, delivered by Le Dain J, and the other is the comprehensive article by Christine French, 'The Contract/Tort Dilemma' [1982] 5 Otago LR 236.

> One might fairly say that the topic has been exhausted, and the futility of adding unnecessarily to an exhausted subject is readily apparent. The risk of futility is heightened by the fact that the argument is largely about theoretical distinctions between contract and tort, rather than the substantive essence of civil liability. I therefore propose to add only one or two brief comments.
>
> There is no doubt that the decisions and literature are overwhelmingly in favour of concurrent liability. I venture to suggest that this preponderance of support for concurrent liability reflects the merits of the competing arguments. The issue is now virtually incontestable; a person who has performed professional services may be held liable concurrently in contract and in negligence unless the terms of the contract preclude the tortious liability.

[60] With regard to the decision of the Privy Council in *Tai Hing Cotton Mill Ltd* Thomas J said at p 193:

> I should interpolate for completeness that there are dicta in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, which might suggest at first reading that the Privy Council have endorsed the notion that the existence of a contractual relationship excludes an analysis of liability in tort (at p 107). However, this is not the case. The board held, on the basis of earlier authorities, that the implied contractual duties which a customer owes to a bank are limited to only two specific obligations. Thus, the contract defines the scope of the customer's duty. Any wider duty is therefore displaced, whether its alleged basis is a further contractual implication or the broader duty of care in tort. I consider that this decision is one where it has been held that the terms of the contract (albeit implied) preclude any liability in tort.

[61] In Singapore the court also held that in the absence of express contractual stipulations, concurrent liabilities in both contract and tort can exist. See *Guan Ming Hardware & Engineering Pte Ltd v Chong Yeo & Partners & Anor* [1966] 2 SLR 621.

[62] Back home a similar issue was considered by this court in *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344. In that case the issue was whether the solicitor's failure to appear at the court's hearing and to inform his client of hearing date which resulted in the giving of a judgment against the client could give rise to a claim in negligence. At p 349 Gopal Sri Ram JCA said:

> Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the solicitor coupled with reliance by the client on the skill of the solicitor. The solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort. Here, we need do no more than quote the words of Lord Goff in *Henderson & Ors v Merrett Syndicates Ltd & Ors* [1994] 3 All ER 506, at p 530:

The judgment of Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571; [1979] Ch 38 provided the first analysis in depth of the question of concurrent liability in tort and contract. Following upon *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5; [1976] QB 801, it also broke the mould, in the sense that it undermined the view which was becoming settled that, where there is an alternative liability in tort, the claimant must pursue his remedy in contract alone. The development of the case law in other common law countries is very striking. In the same year as the *Midland Bank Trust* case, the Irish Supreme Court held that solicitors owed to their client concurrent duties in contract and tort: see *Finlay v Murtagh* [1979] IR 249. Next, in *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 Le Dain J, delivering the judgment of the Supreme Court of Canada, conducted a comprehensive and most impressive survey of the relevant English and Canadian authorities on the liability of solicitors to their clients for negligence, in contract and in tort, in the course of which he paid a generous tribute to the analysis of Oliver J in *The Midland Bank Trust* case. His conclusions are set out in a series of propositions (at pp 521–522); but his general conclusion was to the same effect as that reached by Oliver J. He said (at p 522):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

I respectfully agree.

[63] Having carefully considered the authorities cited and the judgment of the learned trial judge we are satisfied that the learned trial judge has not erred on this point.

[64] Learned counsel for the defendant also submitted that the learned judge erred in imposing an obligation to advise on the defendant in relation to the SWIFT wire transfer. It is contended that the defendant's primary obligation was to comply with the plaintiff's instructions, which was to send the transmission by way of telefax and the defendant did send the SWIFT wire transfer by the SWIFT mode on 11 February 1995. In addition, it was neither pleaded nor any evidence adduced that the appellant played an advisory role.

[65] One of the issues argued in the court below is whether the method adopted by the defendant in sending the SWIFT messages was proper. It was send by fax. It was the plaintiff's case that sending it by fax is wrong. The

defendant said it was the plaintiff who instructed the defendant to do it. In his judgment the learned trial judge said:

> It is true that the plaintiff in the letter dated 30 January 1995 told the defendant to 'telefax the said instrument'. But, the instrument is no other than the 'confirmed, irrevocable, divisible, assignable and transferable cash blocked SWIFT wire transfer' that the letter was talking about. Subsequent correspondence also shows that the parties were talking about SWIFT wire transfer.
>
> DW1, the defendant's own expert witness himself says:
>
> > 9.22 Any facsimile message, whether in SWIFT, 'Free Format' or not, cannot be a SWIFT message by definition...
>
> It may be that the plaintiff did not understand or did not fully understand how a SWIFT wire transfer is effected. It would, in my view, be unfair to expect the plaintiff, a customer, to understand the detail working of a SWIFT wire transfer. It is the bank's officer that should know. If SWIFT wire transfers are not and cannot be sent through facsimile, the defendant bank should say so. Whereas it appears to me that PW1 does not know how SWIFT wire transfer works (and he, being the customer, should not be expected to know), Suhaimi Mahbub, the bank officer (DW3) himself appears not to know much more about it either. This is what he says, referring to the letter dated 30 January 1995 from the plaintiff:
>
> > The instructions concluded that we must 'fax' this instrument. Even though it was mentioned that the instrument was Swift, the plaintiff even gave the words for it (see B 117/8).
>
> I would expect DW3, as an officer of the bank engaged to do the job to know that SWIFT messages are not sent by facsimile, and to tell PW1 so and not to rely on PW1's ignorance as an excuse for his own ignorance.

[66] The learned trial judge was of the view that DW3, as a bank officer who was carrying out his professional duty, had a duty to inform the plaintiff (PW1) that SWIFT messages are not sent by facsimile because the plaintiff as a customer would not understand the detail working of a SWIFT wire transfer.

[67] In support of his contention that the learned trial judge has erred in his finding on this issue learned counsel for the defendant referred to the following passage in *Banking Litigation* by David Warne and Nicholas Elliot QC at p 212:

> The issuing bank owes a duty of care to the applicant as an incident of the banker/customer relationship which arises in contract. An issuing bank may offer advice to a customer in relation to the opening of a credit, the documents to specify, and thereafter as to whether or not to waive discrepancies. A bank, if it assumes an advisory role in relation to a credit, is obliged to give accurate and

careful advice. The general position of the duties of a bank in giving advice is considered in chapter 2 above. In each case it is a question of fact as to whether, first the bank assumed the role of an adviser in relation to the transaction in question, and secondly whether it acted in breach of duty. If and only if these preconditions are satisfied does the customer have a claim against the bank for losses caused by negligent advice.

[68] In the instant case the learned trial judge has made a finding of fact that in the circumstances of the case the defendant had a duty to advise the plaintiff as its customer that SWIFT messages are not sent by facsimile. This is a question of fact and we are unable to find any flaw in the judge's finding. We are therefore of the view that defendant's complaint on this point is also devoid of merit.

BREACH OF CONTRACT OF 16 FEBRUARY 1995

[69] The plaintiff further pleaded in the statement of claim that the defendant was in breach of contract of 16 February 1995 in failing to confirm the availability of funds for the total purchase price of 100,000 metric tons of raw sugar at USD20.65m.

[70] A meeting between officers of the plaintiff and the defendant was held on 16 February 1992 after the failure of the SWIFT. According to the plaintiff it was agreed then that the defendant would issue a confirmation of blocked funds to the value of USD20.65m requested by Arrow Agencies to Union Bank of Switzerland in the form of a standby letter of credit backed by a performance guarantee of 108%. The plaintiff alleged that on 28 February 1995 the defendant confirmed the existence of the credit facility to the value of USD20.65m in favour of the plaintiff to Arrow Agencies, however, adding a term that it was subject to the defendant's solicitor legal advice. The plaintiff contended that that new term resulted in Arrow Agencies rejecting the said credit facility.

[71] The plaintiff said that even though the plaintiff had complied with all the terms agreed by both parties on 16 February 1995, the defendant on 1 March 1995 had breached the contract prematurely when the defendant cancelled the banking facilities. As a result of the termination of the contract by the defendant, Arrow Agencies had on 31 March 1995 terminated the contract to supply raw sugar to the plaintiff.

[72] In its defence the defendant denied that it had agreed at the said meeting to issue a confirmation of blocked funds for USD20.65m as alleged by the plaintiff. According to the defendant at that meeting it merely indicated to the plaintiff that it was willing to consider the plaintiff's

application for that facility provided the defendant was satisfied with the legality, workability and security of the facility applied for.

[73] The learned trial judge made a finding from the evidence and the contemporary documents that arising from the meeting on 16 February 1995 the contract was formed that the defendant agreed to issue a standby letter of credit for USD20.65m. This is what the learned judge said in his judgment on this issue:

> Let us now look at contemporaneous documents. On the same day, 16 February 1995 the defendant wrote to Arrow Agencies that it was 'in the midst of processing to consider for issuing the above Standby letter of credit as requested by our client, Insan Budi Sdn Bhd.
>
> On the same day too, the plaintiff (as I have said, I believe this letter was written by the solicitor for the plaintiff) wrote to Arrow Agencies that:
>
> > pursuant to the conference held today with Bank Utama (M) Sdn Bhd, the directors have agreed to your request as stated in your letter above.
>
> On the following day, 17 February 1995, I believe pursuant to the agreement at the meeting on 16 February 1995, the plaintiff formally applied for the said facility.
>
> Then on 25 February, the defendant, in a letter signed by its vice president and manager, corporate wrote to Arrow Agencies confirming that the defendant 'has extended credit facilities to our client (plaintiff-added) in the amount of USD20.65m ...' However, the letter added that the availability of the credit facilities was subject to the following term:
>
> (c) satisfactory legal advise from our solicitors.
>
> According to the plaintiff it is this new condition that had caused Arrow Agencies to reject the confirmation.
>
> On the balance of probabilities I accept the plaintiff's contention. A confirmation letter should not contain such a term. If the defendant requires a legal advice, it should obtain such advice before giving the confirmation. A confirmation letter with such a term is only conditional advice. Indeed a 'conditional confirmation' is a contradiction in terms. It is not unreasonable that the Arrow Agencies rejected it. What if Arrow Agencies accepts it, ships the sugar and later finds that the defendant, citing legal advice, withdraws or cancels it? In my view, no reasonable supplier would ship the goods on such 'confirmation' of credit facilities.
>
> I hold therefore that arising from the meeting on 16 February 1995, a contract was formed that the defendant agreed to issue a Standby letter of credit for USD20.65 (the increased price) and I hold that by adding a new term in the 'confirmation' letter to Arrow Agencies has caused Arrow Agencies to reject the 'confirmation' of the blocked funds. I hold that the defendant has breached the contract of 16 February 1995.

[74] In his submission learned counsel for the defendant contended that the learned trial judge failed to consider sufficiently or at all the evidence of DW4 on Bank Negara guidelines on single customer exposure and consequently of the defendant's inability to issue the requested standby letter of credit.

[75] On the same day on 16 February 1995 the defendant wrote to Arrow Agencies to inform Arrow Agencies that the defendant was in the midst of processing to consider the issuing of standby letter of credit as requested by the plaintiff.

[76] If no such agreement was reached between the plaintiff and the defendant on 16 February 1995 as claimed by the defendant why did the defendant write this letter to Arrow Agencies? It is our view that this letter supported the plaintiff's version that an agreement had been reached on 16 February 1995 that the defendant would issue a standby letter of credit to Arrow Agencies.

[77] The defendant then, on 28 February 1995, wrote another letter to Arrow Agencies which is as follows:

BANK UTAMA

February 28, 1995

Arrow Agencies C.C.

81, Williams Road

Durban 4001

South Africa

CONFIRMATION OF THE AVAILABILITY OF CREDIT FACILITIES

We, the undersigned, hereby confirm on behalf of our client, Insan Budi Sdn. Bhd. of 23, Jalan SS15/5C, Subang Jaya 47500, Selangor, Malaysia, Account No. 1-020-000066-8 that our Bank has extended credit facilities to our client in the amount of US$20.65 million (US Dollars Twenty Million Six Hundred and Fifty Thousand only).

This confirmation is valid from the date of issuance.

The availability of this credit facility is subject to the following:

(a) Issuance of a performance Bank Guarantee in the form and substance to our satisfaction from a first class and reputable bank acceptable to us for not less than 108% of the standby letter of credit;

(b) Our client complying to the terms and conditions of our offer and utilization of the credit facilities;

(c) Satisfactory legal advise from our solicitors.

.....
HANIF YEOP MD ROSE
(Vice President)

.....
TENGKU MOHAMAD RIZAM AZIZ
(Manager, Corporate)

c.c.
Indus System Florida
(Attn: Mr David)

The contents of the first paragraph of that letter further strengthened the plaintiff's case that the agreement had been made on 16 February 1995.

[78] We have carefully considered the evidence, both oral and documentary, and the finding of the learned trial judge and we are satisfied that the learned trial judge has made a very careful and comprehensive consideration of the facts relating to this matter and has given a thorough and careful evaluation of the evidence available. On the evidence available we are not prepared to say that his finding is clearly wrong. As such we agree with his finding that a contract was formed on 16 February 1995 relating to the credit facilities for the total amount of USD20.65m. Accordingly we find no merit in the defendant's submission on this issue.

[79] Arising out of the first and the revised facilities the defendant counterclaimed against the plaintiff a total sum of RM651,878.80 in respect of processing fee, commission, telex charges, legal costs and loss in the forex contract. Counsel for the defendant submitted that the learned trial judge had totally omitted to give any grounds for the dismissal of the defendant's counterclaim. In his judgment the learned trial judge held, inter alia, that the defendant had breached its contractual duty of care in sending the SWIFT wire transfer and had breached the contract of 16 February 1995. As a result of that Arrow Agencies terminated the contract with the plaintiff. It follows therefore that the defendant was not entitled to get the amount claimed in its counterclaim. That was the reason why the learned trial judge did not deal with the defendant's counterclaim.

[80] For the reasons stated above we find that the defendant's appeal on the issue of liability is devoid of merits.

DAMAGES/QUANTUM

[81] In his judgment the learned trial judge awarded a sum of RM500,000 as damages to the plaintiff with interest at 8% from date of judgment until

full payment. The amount awarded was in respect of the first shipment of 12,500 metric tons of raw sugar only. He dismissed the plaintiff's claim for loss of profit for the whole of 100,000 metric tons of raw sugar on the ground that the contract that existed between the plaintiff and Gula Padang Terap was only for 12,500 metric tons of raw sugar. The learned judge also dismissed the plaintiff's claim for general damages.

[82] Learned counsel for the defendant submitted that the learned trial judge failed to consider that there was no evidence to show that there was a ready supplier of the sugar contracted for because as at 15 December 1994 no vessel had been nominated by the plaintiff to deliver the consignment of sugar to Penang Port.

[83] It must be noted that the condition stated by the defendant in its letter dated 8 February 1995 in respect of ship nomination was that upon the SWIFT wire transfer being effected the beneficiary should nominate the charged vessel name and number within 72 international banking hours. Since the SWIFT failed the plaintiff did not have the opportunity to nominate the vessel. It does not mean that the plaintiff was unable to get a vessel to transport the consignment. From the evidence the learned trial judge found that there was a ready supplier (Arrow Agencies) and a ready buyer (Gula Padang Terap). In fact on 25 July 1994 Gula Padang Terap had issued a letter of credit for the sum of RM7,194,850 as payment for the shipment of the first tranche of raw sugar of 12,500 metric tons. Based on the evidence available we agree with the learned trial judge that the plaintiff was entitled to get damages for loss of profit.

[84] In relation to the assessment of damages done by the learned trial judge learned counsel for the defendant submitted that it is flawed for two reasons. First, a deduction of 20% on income tax is wrong as the rate of tax imposed on companies is not less than 35%. Second, the deduction in respect of the banking charges payable on forex contract, processing fees, commission for issuance of letters of credit and legal fees and stamping made did not take into consideration that these expenses were also incurred in respect of earlier aborted transaction and the amounts are indivisible and payable in full.

[85] There is also a cross-appeal filed by the plaintiff in respect of the damages awarded. One of the grounds raised is that the learned trial judge had erred in his assessment when he made the following erroneous deductions:

> RM149,939 for 'processing fees and commission for issuance of defendants letter of credit (1/8)' when in fact the correct computation ought to be RM64,374.75 only. The learned trial judge therefore made an excess deduction of RM85,564.25.

RM64,074 for 'legal/professional fees/stamping fees (1/8)' when in fact the correct computation ought to be the sum of RM6,591.35 only. The learned trial judge therefore made an excess deduction of RM57,482.65.

The learned trial judge arbitrarily rounded up his own calculation of RM553,221 to RM500,000 thus again making an excess deduction of RM53,221.

[86] In order to fully understand the complaints made by both parties on the assessment made by the learned trial judge we reproduce that part of his judgment which deals with the assessment. It is as follows:

The other clear amount which to my mind should be taken into account is whatever payment the plaintiff would have to pay to the defendant to secure the facilities for the financing of the transaction. The fair way of doing it, I think, is to divide the total amount that would be paid by the plaintiff to the defendant by the number of shipments, as the damages awarded is only in respect of the first shipment and there were supposed to be eight shipments altogether. Again, it must be remembered that this is not an accounting exercise. Considering all these factors I would assess the damages as follows:

Sale price to GPT at USD266.50 per metric ton x 12,500 mt	USD3,331,250
Purchase price by Plaintiff From Arrow Agencies at USD236 per metric ton x 12,500 mt	USD 2,950,000
Difference	USD 381,250
USD1 = RM2.55	
USD381,250 x 2.55	RM 972,187
Less, say 20% for income tax	RM 194,437
Balance	RM777,750
Less Cancellation of Forex Contract (1/8)	RM 10,518
	RM767,232
Less Processing Fees and Commission for issuance of Defendants letter of credit (1/8)	RM 149,939
	RM617,295
Less legal/professional Fees/Stamping Fees (1/8)	RM 64,074
	RM553,221

In the final analysis, I am of the opinion that an award of damages of RM500,000 is a fair and reasonable amount.

[87] According to para 2 of part 1 of Schedule 1 to the Income Tax Act 1967 the rate of income tax to be paid by a company was 30% of its chargeable income in 1995 and 28% in 2002. In this case the learned trial judge deducted 20% only of the amount for income tax. We agree with learned counsel for the defendant that the learned judge has erred on this issue. However, we do not agree with the contention of learned counsel for

defendant that the expenses incurred in respect of the earlier aborted banking facility (which was claimed by the defendant in his counterclaim for RM651,878) should be taken into consideration in calculating the net profit to be awarded to the plaintiff on the ground that the amounts are indivisible and payable in full. It was through the defendant's own negligence and breach of contract that the plaintiff's business venture of importing raw sugar failed. As such, the defendant is not entitled to get the amount claimed in its counterclaim as it had failed to fulfil its obligations to the plaintiff.

[88] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; (ii) that the findings were clearly wrong in law and principle. In *Amar Singh v Chin Kiew* [1960] MLJ 77, Thomson CJ opined:

> The fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

[89] We have carefully considered the submission of learned counsel for the plaintiff on the deductions made by the learned trial judge in respect of processing fees, legal/professional fee and the rounding up of the figure from RM553,221 to RM500,000 and we agree that an excess deduction was made by the learned trial judge. It is to be noted that the actual amounts to be paid for those charges were reflected in the defendant's counterclaim and the defendant's letter dated 26 May 1995. For the reasons stated above we would assess the damages as follows:

Gross profit as decided by the learned trial judge	RM972,187
Less 28% for income tax	RM272,212
Less cancellation of Forex contract (1/8)	RM10,518
Less processing fees and commission for issuance of defendant's letter of credit (1/8)	RM64,374
Less legal/professional fees/ stamping fees (1/8)	RM6,591
Balance	RM618,492

We are therefore of the view that the damages to be awarded to the plaintiff should be RM618,492.

CROSS-APPEAL BY THE PLANTIFF

[90] There is a cross-appeal filed by the plaintiff in respect of the quantum. The first ground raised by the plaintiff in its cross-appeal is that the loss of profit should be awarded for the entire 100,000 metric tons of raw sugar and not only restricted to the first shipment of 12,500 metric tons of raw sugar. It is the contention of learned counsel for the plaintiff that in restricting the assessment of loss of profits only to the first shipment the learned trial judge had acted on a wrong principle, ignored material contemporaneous documents and misapplied and misconstrued the provisions of s 74 of the Contracts Act 1950 and the rule in *Hadley v Baxendale*.

[91] In support of his contention learned counsel for the plaintiff referred to several contemporaneous documents which have been adduced in the trial and referred to by the witnesses. First, the Letter from Gula Padang Terap Bhd dated 26 April 1994 to the plaintiff which stated that the contract was for the sale of 100,000 metric tons of raw sugar with first 15,000 metric tons to be considered as a 'test cargo' and upon its success then Gula Padang Terap Bhd shall enter into the agreement to take delivery of the balance quantity of 85,000 metric tons. Second, the plaintiff's letter dated 3 May 1994 informing the defendant that a total of 100,000 metric tons of raw sugar would be supplied to Gula Padang Terap Bhd in tranches and the trial consignment would be 12,500 metric tons. The plaintiff requested a letter of credit for USD19.8m. Third, by a contract dated 13 June 1994 the defendant approved the banking facility to the plaintiff for RM53m to finance the purchase of 100,000 metric tons of raw sugar to be supplied to Gula Padang Terap Bhd. Fourth, by a letter dated 14 June 1994 Gula Padang Terap Bhd wrote to the defendant to confirm the purchase of 100,000 metric tons of raw sugar from Meridian International Investments Inc through the plaintiff. Fifth, the letter of credit for USD19.8m issued by the defendant on behalf of the plaintiff naming Meridian as beneficiary and West One Bank, Oregon the beneficiary bank expressly referred to the schedule of eight shipments of 12,500 metric tons each totalling 100,000 metric tons. Sixth, the contract between the plaintiff and Arrow Agencies was for the purchase of 100,000 metric tons of raw sugar in eight shipments of 12,500 metric tons each. Seventh, by a letter dated 15 December 1994 Gula Padang Terap confirmed that it would accept 12,500 metric tons of raw sugar and tentatively the delivery schedule on the balance quantity was agreed at 87,500 metric tons. Eighth, on 29 December 1994 Gula Padang Terap Bhd wrote directly to the defendant in a letter captioned 'SUPPLY OF RAW SUGAR GRADE 'E' FOR 100,000 METRIC TON AT US 266.50 PER TON FROM INSAN

BUDI SDN BHD' where it agreed to accept the first shipment of 12,500 metric tons. Ninth, by a letter dated 27 January 1995 the defendant wrote to Arrow Agencies confirming banking facilities of USD19.8m for the plaintiff for the purchase of 100,000 metric tons of raw sugar. Tenth, the defendant itself claimed from the plaintiff 1% processing fee for the banking facility of USD19.8m. Eleventh, the letter of termination dated 31 March 1995 by Arrows Agencies was in respect of the supply of 100,000 metric tons of raw sugar at USD23.6m.

[92] Learned counsel for the plaintiff further submitted that the loss of profit for 100,000 metric tons of raw sugar was within the contemplation of both parties. Such loss arose naturally from the breach by the defendant and was also within the contemplation of the parties as likely to arise from such a breach. It is thus within the requirements of s 74 of the Contracts Act 1950 and the rule in *Hadley v Baxendale*. According to learned counsel for the plaintiff once the loss of profit claimed is foreseeable, then the guilty party is liable to the full extent of it so long as the extent of the loss has been shown on the balance of probabilities. In support of that he cited the case of *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors* [2004] 1 MLJ 657 and *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411.

[93] Based on the plaintiff's claim that the loss of profit should be given for 100,000 metric tons of raw sugar the plaintiff quantified the loss at USD3,050,000.

[94] How did the learned trial judge come to the conclusion that the plaintiff was only entitled to a loss of profit of 12,500 metric tons of raw sugar? The answer is to be found in the following passages of his judgment:

> However, the first question that has to be answered is whether the plaintiff is entitled to the loss of profit in respect of the whole of the 100,000 metric tons of raw sugar or only in respect of the first shipment of 12,500 metric tons.
>
> The first letter from Gula Padang Terap to the plaintiff which is an offer letter states the quantity as 100,000 metric tons but the first shipment of 15,000 metric tons was to be considered as a 'test cargo'. Only in the event that the first shipment 'is proven to be successful whereby it complies with all our terms, then Gula Padang Terap shall enter into an agreement to take delivery of the balance of 85,000 mt ...'. However, the test cargo was reduced to 12,500 metric tons.
>
> On this issue, the evidence of Cik Aishah bt Che Omar, the general manager, finance and administration is most valuable. She said:

> Even though the contract was for 100,000 metric ton if Gula Padang Terap is not satisfied with the first shipment, Gula Padang Terap is not obliged to give the plaintiff further contract for the balance.
>
> B-51 — 29th October 1994 — at this stage we were still prepared to purchase 12,500.

Later, questioned by court, the witness said:

> There was no contract for 100,000 metric ton. There was a contract for 12,500 metric ton. If that is delivered and Gula Padang Terap is satisfied we will sign a contract for 100,000 metric ton inclusive of 12,500 metric ton. There will be no further test shipment.

I think the evidence of PW2 answers the question. There was an offer by Gula Padang Terap to the plaintiff to supply a total of 100,000 metric tons of raw sugar. But, that is subject to Gula Padang Terap being satisfied with the test cargo of 12,500 metric tons. The letter from the plaintiff to Gula Padang Terap dated 15 December 1994 talked about delivery of 12,500 metric tons of raw sugar. In reply, Gula Padang Terap by letter of the same date agreed 'to accept the said cargo of 12,500 mt ...'

So, it is clear the contract that existed was only for 12,500 metric tons.

Furthermore, whether Gula Padang Terap would contract for the balance to be supplied by the plaintiff depends on the successful shipment of the test cargo and upon Gula Padang Terap being satisfied that it fulfils all the conditions imposed by Gula Padang Terap. As the first shipment never materialised, we do not know, had it arrived whether it would satisfy Gula Padang Terap's condition or not.

In the circumstances, in my judgment the plaintiff is only entitled to damages in respect of the first shipment of 12,500 metric tons only.

[95] It is true that in the passages reproduced above the learned trial judge did not mention the contents of the other letters referred to by learned counsel in his submission except the contract letter from Gula Padang Terap dated 26 April 1994. We are however unable to agree with the contention of learned counsel for the plaintiff that the learned trial judge erred in principle in assessing the loss of profit only for 12,500 metric tons. In our view, based on the evidence available the finding of the learned trial judge can be upheld. We agree that all the other letters referred to by learned counsel for the plaintiff mentioned the contract for supply of 100,000 metric tons of raw sugar. However, these letters must be read together with the contract letter of 26 April 1994 and within that context. The learned trial judge had carefully considered that letter of 26 April 1994 in his judgment. In addition he accepted the evidence of PW2 who was the author of that letter that there was a contract for 12,500 metric tons and if that was delivered and Gula Padang Terap was satisfied then only a contract for supply of 100,000 metric tons of raw sugar would be signed. In fact this is clearly reflected in that letter of

26 April 1994 which has been highlighted by the learned trial judge in his judgment. Paragraph B(2) of that letter clearly stated that in the event the first shipment was proven to be a success then Gula Padang Terap would enter into the agreement to take delivery of the balance quantity of 85,000 metric tons. It means the plaintiff had to sign another agreement with Gula Padang Terap for the remaining 85,000 metric tons. As such there was no contract for the supply of 100,000 metric tons of sugar. We are therefore unable to say that the finding made by the learned trial judge on this issue is clearly wrong. He has given satisfactory reasons to justify his finding. In the circumstances we hold that the contention made by learned counsel for the plaintiff is devoid of merits.

[96] The next issue raised by the plaintiff in this appeal is that the award was given in ringgit Malaysia and not in US dollars. Learned counsel for the plaintiff submitted that this involved an international trade, the contract was in US dollars and at that time the exchange rate was RM2.55 to 1 US dollar. As such at the date of judgment on 20 November 2002, the plaintiff should be able to get the same amount of US dollars with his ringgit, at the exchange rate of RM3.80 to 1 US dollar. Furthermore, in its Amended statement of claim the plaintiff prayed for judgment in US dollars. In support of that argument learned counsel cited the House of Lords decision in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 and approved by the Supreme Court in *New Kok Ann Realty Sdn Bhd v Development & Council Bank, New Hebrides (In Liquidation)* [1987] 2 MLJ 57.

[97] In *New Kok Ann Realty Sdn Bhd*'s case the respondent bank had given loan to the appellant company in US dollars. The liquidator of the respondent claimed from the appellant repayment of the loan. The court therefore ordered the appellant to repay the respondent in US dollars.

[98] In *Miliangos v George Frank (Textiles) Ltd*, the plaintiff who was a national of Switzerland agreed to sell and the defendants, an English company, agreed to buy a quantity of polyester yarn. It was agreed that the proper law of the contract was Swiss law and the money of account and payment was Swiss francs. When the defendant did not pay any part of the price the plaintiff brought an action against the defendants to claim for the payment of the goods delivered. The House of Lords, inter alia, held that where a plaintiff brought an action for a sum of money due under a contract he was entitled to claim and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was that of the same country.

[99] We are of the view that the facts in the cases stated above can be distinguished from the facts of the instant case. This matter had been carefully considered by the learned trial judge when he said:

> A few points should be cleared first. First, whether the award should be made in US dollars or in ringgit Malaysia (RM). The claim is in US dollars. That is understandable because of the sharp increase in the exchange rate in favour of US dollars during the period. At that time the exchange rate was the old rate of about RM2.55 per USD1, compared to RM3.80 now. So, the plaintiff would stand to gain if the judgment is given in US dollars.
>
> But, the question is, had the transaction not been aborted, would the plaintiff be paid in Malaysian ringgit or US Dollars? The answer is obvious. Gula Padang Terap would pay the plaintiff in Malaysian ringgit. It is true that the plaintiff would have to pay Arrow Agencies in US Dollars, but the profit comes from what it receives from Gula Padang Terap, not from what it pays to Arrow Agencies and others. So, I hold that the judgment sum be in Malaysian ringgit.

We respectfully agree with the finding of the learned trial judge on this issue.

[100] The final issue raised by learned counsel for the plaintiff in the plaintiff's cross-appeal is in respect of interest pursuant to s 11 of the Civil Law Act 1956. It provides that the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[101] In the instant case the learned trial judge made an order that interest at 8% be paid from the date of judgment (20 November 2002) until full payment on the sum awarded. There was no interest given for the period between the date when the cause of action arose and the date of judgment — a period of about 6 ½ years. Learned counsel for the plaintiff therefore urged this court to grant interest on the sum awarded at 5% per annum from 31 March 1995 (date of termination by Arrow Agencies of the contract to supply 100,000 metric tons of raw sugar) to the date of judgment (20 December 2002).

[102] We are not unmindful of the fact that interest is very much a discretionary matter. That discretion, however, has to be exercised judiciously. The learned trial judge did not state his reasons as to why he deemed it fit that interest from 31 March 1995 to 20 November 2002 should not be given to the plaintiff on the judgment sum. Having carefully considered the facts and the circumstances of the instant case we are of the view that interest before the date of judgment under that s 11 ought to be awarded to the plaintiff. We therefore order that the defendant do pay the interest on the sum awarded from 31 March 1995 to 20 November 2002 at 4% per annum

in addition to the interest awarded by the learned trial judge at 8% from the date of the judgment.

CONCLUSION

[103] For the reasons given above the appeal by the defendant is dismissed with costs and the cross-appeal by the plaintiff in respect of the quantum of the award and the interest is allowed with costs. The order of the learned trial judge in awarding a sum of RM500,000 as damages is set aside and in substitution thereof we order that the defendant do pay the plaintiff a sum of RM618,492 with interest at the rate of 4% from 31 March 1995 to 20 November 2002 and thereafter interest at 8% per annum until full payment. Deposit for this appeal is to be paid to the plaintiff on account of taxed costs.

[104] This judgment is made pursuant to s 42 of the Courts of Judicature Act 1964 as our learned brother Mokhtar bin Hj Sidin JCA has since retired.

Defendant's appeal dismissed with costs. The plaintiff's cross-appeal in respect of quantum of award and the interest allowed with costs.

Reported by K Nesan